UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MY HEALTH, INC., Plaintiff, v. DEVILBISS HEALTHCARE, LLC, Defendant.	Case No. 2:16-cv-00544-RWS-RSP

DEFENDANT DEVILBISS HEALTHCARE, LLC'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. Introduction 1

B. The Complaint and the '985 Patent 1

1. The Method of Claim 1 1
2. The Other Independent Claims 3
3. The Dependent Claims 4
4. The Specification 4

ARGUMENT 5

THE COMPLAINT SHOULD BE DISMISSED UNDER 35 U.S.C. § 101 AND THE SUPREME COURT DECISION IN ALICE 5

I. The Standard on a Motion to Dismiss 5

II. Abstract Ideas and Mental Processes Are Not Patentable Under § 101 7

III. The '985 Patent Covers Abstract Ideas and Mental Processes, Rather Than Patent-Eligible Subject Matter 11

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Abrams Shell v. Shell Oil Co.,
343 F.3d 482 (5th Cir. 2003) 6

Alice Corp. Pty. Ltd. v. CLS Bank Intl,
573 U.S. ____, 134 S. Ct. 2347 (2014)....................1, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18

Bancorp Servs. v. Sun Life Assurance Co.,
687 F.3d 1266 (Fed. Cir. 2012)....................7

Bell Alt. Corp. v. Twombly,
550 U.S. 554 (2007)....................6

In re Bilski,
545 F.3d 943 (Fed. Cir. 2008), *aff'd sub nom. Bilski v. Kappos,* 561 U.S. 593, 130 S. Ct. 3218 (2010)....................7, 8

Bilski v. Kappos,
561 U.S. 593, 130 S. Ct. 3218 (2010)....................7, 8, 9, 12

Clear With Computers, LLC v. Dick's Sporting Goods, Inc.,
2014 U.S. Dist. LEXIS 32209 (E.D. Tex. Jan. 21, 2014)....................7, 16

Colony Ins. Co. v. Peachtree Constr., Ltd.,
647 F.3d 248 (5th Cir. 2011) 6

Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n,
No. 12-2501 (MAS) (TJB) 2013 U.S. Dist. LEXIS 107184 (D.N.J. July 31, 2013) 7, 16

CyberSource Corp. v. Retail Decisions, Inc.,
654 F.3d 1366 (Fed. Cir. 2011)....................14, 15

Dealertrack, Inc. v. Huber,
674 F.3d 1315 (Fed. Cir. 2012)....................8

DietGoal Innovations LLC v. Bravo Media LLC,
13 Civ. 8391, 2014 U.S. Dist. LEXIS 92484 (S.D.N.Y. July 8, 2014) 7, 9, 16

Dorsey v. Portfolio Equities, Inc.,
540 F.3d 333 (5th Cir. 2008) 6

Molecular Pathology v. Myriad Genetics, Inc.,
569 U.S. ___, 133 S. Ct. 2107 (2013)....................8

Funk Bros. Seed Co. v. Kalo Inoculant Co.,
333 U.S. 127 (1948) 8

Gametek LLC v. Zynga, Inc.,
No. CV-13-2546-RS, 2014 U.S. Dist. LEXIS 58061 (N.D. Cal. Apr. 25, 2014) 7

Gentilello v. Rege,
627 F.3d 540 (5th Cir. 2010) 6

Gottschalk v. Benson,
409 U.S. 63 (1972) 8, 14

Lumen View Tech. LLC v. Findthebest.com, Inc.,
984 F. Supp. 2d 189 (S.D.N.Y. Nov. 22, 2013) 7

Mayo Collaborative Servs. v. Prometheus Labs.,
566 U.S. 10, 132 S. Ct. 1289 (2012) 8, 9, 10, 11, 14, 15

Parker v. Flook,
437 U.S. 584 (1978) 8, 11

PerkinElmer v. Intema Ltd.,
496 F. App'x 65 (Fed. Cir. 2012) 11

Rockstar Consortium US LP v. Samsung Elecs. Co.,
Case No. 2:13-CV-00894-JRG, 2014 U.S. Dist. LEXIS 67097 (E.D. Tex. May 15, 2014) 16, 17

Scott v. Liberty County,
No. 1:10-cv-609, 2012 U.S. Dist. LEXIS 170148 (E.D. Tex. Nov. 30, 2012) 6

Sinclair-Allison, Inc. v. Fifth Ave. Physician Servs., LLC,
No. CIV-12-360-M, 2012 U.S. Dist. LEXIS 179138 (W.D. Okla. Dec. 19, 2012), *aff'd mem.* 2013 U.S. App. LEXIS 18904 (Fed. Cir. Sept. 12, 2013) 7

SmartGene, Inc. v. Advanced Biological Labs.,
852 F. Supp. 2d 42 (D.D.C. 2012), *aff'd,* 555 F. App'x 950 (Fed. Cir. 2012) 11, 12, 13, 14, 15

Telemac Cellular Corp. v. Topp Telecom, Inc.,
247 F.3d 1316 (Fed. Cir. 2001) 5

UbiComm, LLC v. Zappos IP, Inc.,
No. 13-1029-RGA, 2013 U.S. Dist. LEXIS 161559 (D. Del. Nov. 13, 2013) 7, 16

Ultramercial, Inc. v. Hulu, LLC,
722 F.3d 1335 (Fed. Cir. 2013), *cert. granted, vacated and remanded sub nom* 16, 17

Uniloc USA., Inc. v. Rackspace Hosting, Inc.,
No. 6:12-cv-375, 2013 U.S. Dist. LEXIS 185505 (E.D. Tex. Mar. 27, 2013) 6, 7, 16

WildTangent, Inc. v. Ultramercial, LLC,
573 U.S. ___, 134 S.Ct. 2870 (2014) 16, 17

Wolcott v. Sebelius,
635 F.3d 757 (5th Cir. 2011) 6

X2Y Attenuators, LLC v. ITC,
757 F.3d 1358 (Fed. Cir. 2014) 5

Statutes and Rules

35 U.S.C. § 101 ....1, 7, 8, 10, 11, 12, 14, 17, 18

Fed. R. Civ. P. 12(b)(6) 1, 6

Rule 12 ....7, 16

Other Authorities

Bashshur et al., TELEMEDICINE: THEORY AND PRACTICE 9 (Chas. C. Thomas Publisher 1997) 5

Falconer, *Telemedicine Systems and Telecommunications* 5

Field, TELEMEDICINE: A GUIDE TO ASSESSING TELECOMMUNICATIONS IN HEALTH CARE 16 (National Academy Press 1996) 5

Grant, *Allergy, Asthma, and Immunology* 5

U.S. Patent No. 6,612,985 ....1, 3, 4, 5, 11, 12, 13, 15, 16, 18

A. Introduction

The Supreme Court held in *Alice Corp. Pty. Ltd. v. CLS Bank Intl,* 573 U.S. ____, 134 S. Ct. 2347 (2014), that patent claims on a method of achieving intermediated settlements were addressed to an "abstract idea" and thus ineligible for patent protection under § 101 of the patent statute, 35 U.S.C. § 101.

On the authority of that Supreme Court decision, defendant DeVilbiss Healthcare, LLC moves to dismiss the Complaint in this case under Fed. R. Civ. P. 12(b)(6). The asserted patent is directed at abstract ideas relating to basics of medical practice — assessing a patient's condition, revising the patient's treatment plan if needed, advising the patient of the revised treatment plan, and monitoring compliance — for a patient at a remote location. Under *Alice* and other authority, the patent here is an egregious example of a patent on an abstract idea.

B. The Complaint and the '985 Patent

In this case, plaintiff My Health, Inc. accuses DeVilbiss Healthcare of infringing U.S. Patent No. 6,612,985 ("the '895 patent"). The '985 patent is entitled "Method and System for Monitoring and Treating a Patient." A copy of the '985 patent is attached to the Complaint as Exhibit A. The patent has three independent claims and six dependent claims.

1. The Method of Claim 1

Claim 1 is a representative claim. It is addressed to the general idea of treating and monitoring a patient at a remote location. The claim reads as follows:

> 1. A method for tracking compliance with treatment guidelines, the method comprising:
>
> [a] determining a current assessment of one or more diagnosed conditions in a patient based on data about each of the diagnosed conditions from the patient who is at a remote location and on one or more assessment guidelines for each of the diagnosed conditions;

[b] updating an existing treatment plan for each of the diagnosed conditions based on the existing treatment plan, the current assessment, and on one or more treatment guidelines for each of the diagnosed conditions to generate an updated treatment plan for each of the diagnosed conditions;

[c] reviewing the updated treatment plan for each of the diagnosed conditions;

[d] determining if one or more changes are needed to the reviewed treatment plan for each of the diagnosed conditions;

[e] changing the reviewed treatment plan if the one or more changes are determined to be needed;

[f] providing the patient with the reviewed treatment plan for each of the diagnosed conditions; and

[g] generating and providing compliance data based on the updated treatment plan and the reviewed treatment plan for each of the diagnosed conditions.

Each step of this method is general and abstract. The claimed method involves nothing more than:

a) assessing the patient's condition based on patient data and unspecified "assessment guidelines" for a patient at a remote location (step [a]);

b) updating the patient's treatment plan in an unspecified way based on his/her condition and unspecified "treatment guidelines" (step [b]);

c) reviewing the updated treatment plan (step [c]);

d) considering whether changes to the treatment plan are needed based on unspecified factors (step [d]);

e) changing the treatment plan in an unspecified way if needed based on unspecified criteria (step [e]);

f) providing the patient with the treatment plan (step [f]); and

g) generating and providing "compliance data" (step [g]).

The first five steps are mental processes that can be performed in a physician's mind. The sixth step (advising the patient of the recommended treatment) and the last step (generating and providing data on compliance) could be performed on the telephone or by fax or email or by using a general purpose computer. Taken as a whole, the claimed method addresses an abstract concept for remotely treating and monitoring a patient.

2. The Other Independent Claims

The '985 patent has two other independent claims, claims 4 and 7. These claims are similar to method claim 1 and are also general and abstract.

Independent claim 4 covers "[a] system for tracking compliance in treating patients ...." Claim 4 is essentially a system for performing the method of claim 1, with various "systems" used to perform the steps of the claim 1 method, again for a patient at a remote location. Thus, the system of claim 4 comprises:

a) "an assessment processing system that determines a current assessment of [the patient's] diagnosed conditions ... based on [unspecified] assessment guidelines";

b) "a treatment processing system that updates an existing treatment plan" based on the current assessment and unspecified "treatment guidelines";

c) "a review system that modifies the updated treatment plan [in unspecified ways] if one or more changes are determined to be needed";

d) "a presentation system that provides the reviewed treatment plan for each of the diagnosed conditions"; and

e) "a compliance system that generates and provides compliance data ...."

Although claim 4 does not recite a computer, an off-the-shelf general purpose computer would suffice.

Independent claim 7 covers a "computer readable medium" that performs the method of claim 1. The preamble of that claim recites "[a] computer readable medium having stored thereon instructions for tracking compliance with treatment guidelines which when executed by a processor, cause the processor to perform the steps of ....” The body of the claim then echoes the claim 1 method steps. Again, a general purpose computer would suffice.

3. The Dependent Claims

The last clause in each independent claim involves “generating and providing compliance data.” For each of the independent claims, there are two dependent claims directed to the “compliance data.” The dependent claims also are general and abstract.

For claims 2, 5 and 8, the “compliance data” comprises “provider information.” These claims recite the “method” (of claim 1) or “system” (of claim 4) or “medium” (of claim 7) “wherein the compliance data comprises provider information on the number of reviewed treatment plans which are different from a corresponding one of the updated treatment plans for each provider.”

For claims 3, 6 and 9, the “compliance data” comprises data on “patient compliance.” These claims recite the “method” (of claim 1) or “system” (of claim 4) or “medium” (of claim 7) “wherein the compliance data comprises data on patient compliance with at least one of the existing treatment plan [sic] for each diagnosed condition.”

4. The Specification

The specification of the ‘985 patent acknowledges that by the time the application for the patent was filed (on February 26, 2001), “Internet-based monitoring of chronically ill patients” was in use, albeit (according to the specification) “in its infancy.” Complaint, Ex. A at col. 1:52-54. The specification describes one such approach that was used in 1998. *Id.* at col. 1:55-60.[1]

---

[1] If this case is not dismissed at the outset, DeVilbiss Healthcare will demonstrate at an appropriate time that the use of computers in treating and monitoring patients at remote locations was well-known by February 2001. It was referred to in the literature as “telemedicine” and it was the subject of many books and articles. *See, e.g., Bashshur et al.,* TELEMEDICINE: THEORY AND PRACTICE 9 (Chas. C. Thomas Publisher 1997) (describing telemedicine as involving the use of “computers ... to deliver health services to remote patients ....”); Field, TELEMEDICINE: A

The specification of the '985 patent states that "[t]he present invention ... can be implemented on a single program general purpose computer or separate program general purpose computer." Complaint, Ex. A at col. 14:60-62. "[T]he disclosed methods may be readily implemented as software executed on a programmed general purpose computer, a microprocessor, or the like." *Id.* at col. 15:24-27.

ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED UNDER 35 U.S.C. § 101 AND THE SUPREME COURT DECISION IN *ALICE*

I. THE STANDARD ON A MOTION TO DISMISS

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) "tests the legal sufficiency of the plaintiffs claim for relief" *Scott v. Liberty County,* No. 1:10-cv-609, 2012 U.S. Dist. LEXIS 170148, at *6 (E.D. Tex. Nov. 30, 2012). When the allegations in a complaint do not raise a claim of entitlement to relief "'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court,'" *i.e.,* at the pleading stage. *Uniloc USA., Inc. v. Rackspace Hosting, Inc.,* No. 6:12-cv-375, 2013 U.S. Dist. LEXIS 185505, at *4 (E.D. Tex. Mar. 27, 2013) (quoting *Bell Alt. Corp. v. Twombly,* 550 U.S. 554, 558 (2007)).

"Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, 'documents incorporated into the complaint by reference,' and matters of which a

Guide To ASSESSING TELECOMMUNICATIONS IN HEALTH CARE 16 (National Academy Press 1996) (describing telemedicine as "the use of electronic information and communications technologies [including 'computer technologies'] to provide and support health care when distance separates the participants"); Falconer, *Telemedicine Systems and Telecommunications,* in INTRODUCTION TO TELEMEDICINE 17, 31 (Wootton & Craig eds., 1999) (describing telemedicine as allowing communications "between patient and doctor" and "between doctors and other health professionals" using, e.g., the Internet); Grant, *Allergy, Asthma, and Immunology,* in TELEMEDICINE: PRACTICING IN THE INFORMATION AGE 291, 293, 295-96 (Viegas & Dunn eds., 1998) (describing a telemedicine program administered by the Texas Department of Clinical Justice, in which doctors used telemedicine in assessing the condition of patients, and in determining and revising treatment plans).

court may take judicial notice.'" *Wolcott v. Sebelius,* 635 F.3d 757, 763 (5th Cir. 2011) (quoting *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008)). "When considering a Rule 12(b)(6) motion, [a court must] liberally construe the complaint in favor of the plaintiff and accept all well-pleaded factual allegations as true." *Colony Ins. Co. v. Peachtree Constr., Ltd.,* 647 F.3d 248, 252 (5th Cir. 2011). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Abrams Shell v. Shell Oil Co.,* 343 F.3d 482, 486 (5th Cir. 2003); *see also Gentilello v. Rege,* 627 F.3d 540, 544 (5th Cir. 2010) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.") (internal quotation marks omitted).

Where, as here, a Rule 12 motion raises the legal question of whether a patent addresses patent-ineligible subject matter under 35 U.S.C. § 101, claim construction and discovery are not prerequisites to a ruling for the movant. *Bancorp Servs. v. Sun Life Assurance Co.,* 687 F.3d 1266, 1273 (Fed. Cir. 2012). As the Federal Circuit has noted, the Supreme Court has found subject matter ineligible for patent protection without claim construction. *Id.* (citing *Bilski v. Kappos,* 561 U.S. 593, 130 S. Ct. 3218, 3231 (2010)).

Where the "only plausible reading of the patent" provides clear and convincing evidence of patent-ineligibility the patent must be invalidated at the pleading stage. *Lumen View Tech. LLC v. Findthebest.com, Inc.,* 984 F. Supp. 2d 189, 204 (S.D.N.Y. Nov. 22, 2013) (internal quotation marks omitted). For this reason, courts have increasingly dismissed cases on the pleadings where the asserted patent does not meet the requirements of patent eligibility under § 101. *See, e.g., Clear With Computers, LLC v. Dick's Sporting Goods, Inc.,* 2014 U.S. Dist. LEXIS 32209 (E.D. Tex. Jan. 21, 2014) (granting motion for judgment on the pleadings and holding claims invalid under § 101 as addressed to an abstract idea); *Uniloc*, 2013 U.S. Dist. LEXIS 185505 (E.D. Tex. Mar. 27, 2013) (same).[2]

II. Abstract Ideas and Mental Processes Are Not Patentable Under § 101

"Whether a claim is drawn to patent-eligible subject matter under [35 U.S.C.] § 101 is a threshold inquiry," *In re Bilski,* 545 F.3d 943, 950 (Fed. Cir. 2008), *aff'd sub nom. Bilski v. Kappos,* 561 U.S. 593, 130 S. Ct. 3218 (2010), which presents a question of law for the Court to decide. *Dealertrack, Inc. v. Huber,* 674 F.3d 1315, 1333 (Fed. Cir. 2012). A patent claim that covers patent-ineligible subject matter "must be rejected even if it meets all of the other requirements of patentability." *Bilski*, 545 F.3d at 950.

Under § 101, abstract ideas and mental processes are not patentable. The Supreme Court "'ha[s] long held that [§ 101] contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.'" *Alice Corp. Pty. Ltd. v. CLS Bank Intl,* 573 U.S. ___, 134 S. Ct. 2347, 2354 (2014) (quoting *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.,* 569 U.S. ___, 133 S. Ct. 2107, 2116 (2013)). Similarly, the Supreme Court repeatedly has stated that "'mental processes ... are not patentable, as they are the basic tools of scientific and technological work.' *Mayo Collaborative Servs. v. Prometheus Labs.,* 566 U.S. 10, 132 S. Ct. 1289, 1293 (2012) (quoting *Gottschalk v. Benson,* 409 U.S. 63, 67 (1972)); *see also Parker v. Flook,* 437 U.S. 584, 589 (1978) (same). Abstract ideas and mental processes are "'part of the storehouse of knowledge ... free to all men and reserved to none.'" *Bilski v. Kappos*, 561

[2] *See also DietGoal Innovations LLC v. Bravo Media LLC*, 13 Civ. 8391, 2014 U.S. Dist. LEXIS 92484 (S.D.N.Y. July 8, 2014); *Gametek LLC v. Zynga, Inc.,* No. CV-13-2546-RS, 2014 U.S. Dist. LEXIS 58061 (N.D. Cal. Apr. 25, 2014); *UbiComm, LLC v. Zappos IP, Inc.*, No. 13-1029-RGA, 2013 U.S. Dist. LEXIS 161559 (D. Del. Nov. 13, 2013); *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n,* No. 12-2501 (MAS) (TJB) 2013 U.S. Dist. LEXIS 107184 (D.N.J. July 31, 2013); *Sinclair-Allison, Inc. v. Fifth Ave. Physician Servs., LLC,* No. CIV-12-360-M, 2012 U.S. Dist. LEXIS 179138 (W.D. Okla. Dec. 19, 2012), *aff'd mem.* 2013 U.S. App. LEXIS 18904 (Fed. Cir. Sept. 12, 2013) (all dismissing infringement actions under Rule 12 where the patent-in-suit was directed at an abstract idea).

U.S. 593, 130 S. Ct. 3218, 3225 (2010) (quoting *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948)).

As outlined by the Supreme Court, the "framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts" involves two steps. *Alice*, 134 S. Ct. at 2355. First, a court "determine[s] whether the claims at issue are directed to one of those patent-ineligible concepts." *Id*. "If so, [the court] then ask[s], '[w]hat else is there in the claims before [it]?' *Id.* (quoting *Mayo*, 132 S. Ct. at 1297). The Supreme Court has described step two of this analysis as "a search for an 'inventive conceptive' — *i.e.,* an element or combination of elements that is 'sufficient to ensure that the patent in practice amount to significantly more than a patent upon [the abstract idea] itself.' *Id.* (quoting *Mayo*, 132 S. Ct. at 1294) (bracketed text added by the Supreme Court in *Alice*).

The Supreme Court has refrained from providing a definition of "abstract" ideas. Instead, it has instructed that "[its] precedents on the unpatentability of abstract ideas provide useful tools" or "guideposts" for analyzing the issue. *Bilski*, 130 S. Ct. at 3229, 3231.

Alice is the most recent such "guidepost."[3] The patent there was directed at a method of exchanging obligations. Claim 33 was a "representative" claim. *Id.*, 134 S. Ct. at 2352 n.2. It is quoted below (*id.*):

> A method of exchanging obligations as between parties, each party holding a credit record and a debit record with an exchange institution, the credit records and debit records for exchange of predetermined obligations, the method comprising the steps of:
>
> (a) creating a shadow credit record and a shadow debit record for each stakeholder party to be held independently by a supervisory institution from the exchange institutions;

[3] The line of Supreme Court cases leading up to *Alice* is discussed in *DietGoal*, 2014 U.S. Dist. LEXIS 92484, at *17-27.

> (b) obtaining from each exchange institution a start-of-day balance for each shadow credit record and shadow debit record;
>
> (c) for every transaction resulting in an exchange obligation, the supervisory institution adjusting each respective party's shadow credit record or shadow debit record, allowing only these transactions that do not result in the value of the shadow debit record being less than the value of the shadow credit record at any time, each said adjustment taking place in chronological order, and
>
> (d) at the end-of-day, the supervisory institution instructing on[e] of the exchange institutions to exchange credits or debits to the credit record and debit record of the respective parties in accordance with the adjustments of the said permitted transactions, the credits and debits being irrevocable, time invariant obligations placed on the exchange institutions.

In addition to method claims, the patent in *Alice* — like the patent-in-suit here — included "system claims" on a system for carrying out the claimed method, and "media claims" on a "computer-readable medium containing program code for performing the method ...." *Id.*, 134 S. Ct. at 2353.

The Supreme Court described the claims in *Alice* as addressed to "a method of exchanging financial obligations between two parties using a third-party intermediary to mitigate settlement risk" in which "[t]he intermediary creates and updates 'shadow' records to reflect the value of each party's actual accounts held at 'exchange institutions,' thereby permitting only those transactions for which the parties have sufficient resources." *Id.,* 134 S. Ct. at 2356. "At the end of each day, the intermediary issues irrevocable instructions to the exchange institutions to carry out the permitted transactions." *Id.*

The Supreme Court held, unanimously, that the claims were directed to an abstract idea that is not eligible for patent protection, *i.e.,* "the abstract idea of intermediated settlement," and that they did not "contain[ ] an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Alice*, 134 S. Ct. at 2355, 2357 (quoting *Mayo*, 132 S. Ct. at 1294).

The Supreme Court further held that the "system" claims and claims on a "computer-readable medium" "add nothing of substance to the underlying abstract idea" and also were "patent ineligible under § 101." *Alice*, 134 S. Ct. at 2360. It emphasized that "the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Id.* at 2358. "Given the ubiquity of computers, ... wholly generic computer implementation is not generally the sort of 'additional featur[e]' that provides any 'practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.'" *Id.* (quoting *Mayo*, 132 S. Ct. at 1297) (bracketed language added by the Supreme Court in *Alice*). If implementing an abstract idea on a computer were enough to merit patent protection then "an applicant could claim any principle of the physical or social sciences by reciting a computer system configured to implement the relevant concept. Such a result would make the determination of patent eligibility 'depend simply on the draftsman's art,' ... thereby eviscerating the rule that ' [1]aws of nature, natural phenomena, and abstract ideas are not patentable,' ...." *Id.* at 2359 (quoting Flook, 437 U.S. at 593).

These principles are fully applicable to patents on abstract ideas for medical diagnosis and treatment. *See SmartGene, Inc. v. Advanced Biological Labs.,* SA, 852 F. Supp. 2d 42, 57 (D.D.C. 2012), *aff'd,* 555 F. App'x 950 (Fed. Cir. 2014) (granting summary judgment, affirmed on appeal, that patent claims on a method of selecting a therapeutic treatment regimen were not patent-eligible under § 101); *PerkinElmer v. Intema Ltd.,* 496 F. App'x 65 (Fed. Cir. 2012) (ordering judgment of invalidity under § 101 of patent on method for estimating risk of fetal Down's syndrome); *cf. Mayo,* 132 S. Ct. 1289 (patent on method for determining proper dosage of thiopurine drugs addressed laws of nature that were not eligible for patent protection under § 101).

III. THE '985 PATENT COVERS ABSTRACT IDEAS AND MENTAL PROCESSES, RATHER THAN PATENT-ELIGIBLE SUBJECT MATTER

A simple comparison of the claims of the '985 patent (quoted at pages 1-4) and the claims that the Supreme Court rejected in *Alice* (quoted at pages 8-9) shows that the claims here are much more abstract than those in *Alice*. The claims here cover an abstract idea for treating and monitoring a remote patient, nothing more. The claimed method involves the basic concept of assessing the condition of remote patient; revising the patient's treatment plan if appropriate; informing the patient of the revised treatment plan; and gathering compliance data. Using *Alice* as a "guidepost" (Bilski, 130 S. Ct. at 3231), the '985 patent is an egregious example of a patent on an abstract idea.

SmartGene, Inc. v. Advanced Biological Laboratories, SA, 852 F. Supp. 2d 42, 57 (D.D.C. 2012), *aff'd*, 555 F. App'x 950 (Fed. Cir. 2014), is instructive. The patent there claimed "[a] method for guiding the selection of a therapeutic regimen for a patient with a known disease or medical condition," which involved "(1) 'provid[ing] patient information to a computing device' having routine input, memory, look-up, comparison, and output capabilities and that (2) 'generat[es] ... a ranked listing of therapeutic regimens'; and (3) 'generat[es] ... advisory information for one or more of the therapeutic treatment regimens ....'" *Id.*, 555 F. App'x at 954-55.

The district court concluded that the claim was directed at the use of a computer to perform mental steps that doctors regularly perform in formulating patient treatment plans and accordingly granted summary judgment that the claimed subject matter was patent-ineligible under § 101. *SmartGene*, 852 F. Supp. 2d at 57.

The Federal Circuit affirmed. *SmartGene*, 555 F. App'x 950. It summarized earlier precedents as holding that "section 101 covers neither 'mental processes' — associated with or as part of a category of 'abstract ideas' — nor processes that merely invoke a computer and its basic functionality for implementing such mental processes, without specifying even arguably new physical components or specifying processes defined other than by mentally performable steps." *Id.* at 954. It held that the claim was not patent-eligible under § 101 because it "does no more than call on a 'computing device,' with basic functionality for comparing stored and input data and rules, to do what doctors do routinely." *Id*. at 954. It concluded that the claim "involves a mental process excluded from section 101: the mental steps of comparing new and stored information and using rules to identify medical options." *Id*. at 955. The Federal Circuit stated that on the facts in SmartGene, "the concern about preempting public use of certain kinds of knowledge, emphasized [by the Supreme Court] in Mayo, is a grave one." *Id.*

This case raises the same "grave" concern. Claim 1 of the '985 patent covers steps that physicians routinely perform in treating and monitoring patients. The first five steps of the '985 method — (a) "determining a current assessment of one or more diagnosed conditions"; (b) "updating an existing treatment plan"; (c) "reviewing the updated treatment plan"; (d) "determining if one or more changes are needed to the reviewed treatment plan"; and (e) "changing the reviewed treatment plan if ... needed" — are even more abstract than the method steps in *Alice*. These steps are addressed to the abstract idea of assessing a patient's condition and revising a treatment plan.

The claims do not purport to require a novel or unique way of assessing a patient's condition or revising a treatment plan. The vagueness — and breadth — of claims is staggering. The first method step addresses the abstract concept of assessing a patient's diagnosed condition, without regard to what the condition may be or what the assessment may indicate. The "diagnosed condition" could be anything from a canker sore to cancer, and the "assessment" of that condition could run the gamut of all possible assessments. Method steps 2-5 are just as abstract. The "treatment plan" could involve exercise or bed rest, amputation or acupuncture — or anything else. The claims cover the abstract concept of revising a treatment plan, without regard to what the treatment plan may be or what the revision may entail.

Like the method steps that were rejected as patent-ineligible in *SmartGene*, the steps of the '985 method merely "track the abstract mental processes of a doctor treating a patient," based on the doctor's medical training and experience or by looking up possible diagnoses and treatments. *SmartGene*, 852 F. Supp. 2d at 64, aff'd, 555 F. App'x 950. They are "a familiar part of the conscious process that doctors can and do perform in their heads." 555 F. App'x at 955. "Accordingly, ... they are abstract ideas and unpatentable, *id.,* 852 F. Supp. 2d at 57, because "'mental processes ... are not patentable.'" *Mayo*, 132 S. Ct. at 1293 (quoting *Gottschalk*, 409 U.S. at 67); *see also CyberSource Corp. v. Retail Decisions, Inc.,* 654 F.3d 1366, 1373-74 (Fed. Cir. 2011) (steps that can "be performed in the human mind, or by a human using a pen and paper" are "unpatentable mental processes").

The remaining steps of the '985 method are also in the realm of abstract ideas. The fifth step of the method — providing the treatment plan to the patient (step [f]) — involves nothing more than advising the patient of the treatment the doctor recommends. This is another routine aspect of medical practice, one "that is performed in doctors' offices every day." *SmartGene*, 852 F. Supp. 2d at 56, *aff'd,* 555 F. App'x 950. Doctors routinely "advise[ ] the[ir] patient[s] about treatment regimen options, and the doctor's recommendation for the patient." *Id.* Again, the claims do not purport to cover some novel or unique way of doing so.

The sixth and final method step — "generating and providing compliance data" (step [g]) — also involves an abstract idea. The claim does not say how the compliance data is used, if it is used at all. The Federal Circuit has warned that method steps "that simply collect and compare data, without applying the data in a step of the overall method, may fail to traverse the § 101 filter." *Classen Immunotherapies, Inc. v. Biogen*, 659 F.3d 1057, 1067 (Fed. Cir. 2011). Here, the claim requires even less — merely "gathering and presenting" data, with no requirement that the data is generated, compared or applied in a novel or unique way.

The dependent claims also do not require "applying the data" in any way as part of the overall method. *Classen*, 659 F.3d at 1067. They simply recite that the "compliance data" comprises "provider information on the number of reviewed treatment plans ..." (for claims 2, 5 and 8) or "data on patient compliance ..." (for claims 3, 6 and 9).

Viewed as a whole, the method claims in the '985 patent cover abstract ideas for treating and monitoring a patient, and do not provide any "element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than the [abstract idea] itself.'" *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 132 S. Ct. at 1294). The method steps "mirror the mental processes that a physician performs, and therefore embody the `basic tools of scientific and technological work' that are free to all men and reserved exclusively to none." *SmartGene*, 852 F. Supp. 2d at 64, *aff'd,* 555 F. App'x 950 (quoting *CyberSource*, 654 F.3d at 1373). A patent on basic steps for treating patients raises the same "grave" concern about "preempting public use" of medical knowledge that the Federal Circuit warned against in *SmartGene*, 555 F. App'x at 955.

The other claims in the '985 patent — covering a "system" (claims 4-6) and "computer readable medium" (claims 7-9) — are just as deficient. As in *Alice*, these claims "fail for substantially the same reasons [as the method claims].” *Id.*, 134 S. Ct. at 2360. The specification of the ‘985 patent states that “[t]he present invention ... can be implemented on a single program general purpose computer or separate program general purpose computer.” Complaint, Ex. A at col. 14:60-62. Nothing in the patent’s system claims (claims 4-6) or computer-readable medium claims (claims 7-9) requires anything more. “[M]ere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Alice*, 2014 U.S. LEXIS 4303, at *26; “[A] ‘computer readable medium’ limitation ... does not make [an] otherwise unpatentable method patent-eligible under§ 101.” *CyberSource*, 654 F.3d at 1375.

In sum, the ‘985 patent covers abstract ideas and mental processes that are not eligible for patent protection. Under *Alice*, the Complaint accordingly should be dismissed on the pleadings under Rule 12. *See Clear With Computers,* 2014 U.S. Dist. LEXIS 32209 (E.D. Tex. Jan. 21, 2014); *Uniloc*, 2013 U.S. Dist. LEXIS 185505 (E.D. Tex. Mar. 27, 2013); *DietGoal,* 2014 U.S. Dist. LEXIS 92484; *UbiComm*, 2013 U.S. Dist. LEXIS 161559; *Content Extraction*, 2013 U.S. Dist. LEXIS 107184 (all granting such relief).

The pre-*Alice* decision in *Rockstar Consortium US LP v. Samsung Elecs. Co.,* Case No. 2:13-CV-00894-JRG, 2014 U.S. Dist. LEXIS 67097 (E.D. Tex. May 15, 2014), does not support a different conclusion. The Court there relied on *Ultramercial, Inc. v. Hulu, LLC,* 722 F.3d 1335 (Fed. Cir. 2013), *cert. granted, vacated and remanded sub nom.*, *WildTangent, Inc. v. Ultramercial, LLC,* 573 U.S. ____, 134 S.Ct. 2870 (2014), in finding — prior to *Alice* — that the claims of the patent-in-suit addressed the “application” of a concept, rather than the concept itself, *Rockstar*, 2014 U.S. Dist. LEXIS 67097, at *15 (quoting *Ultramercial*, 722 F.3d at 1343), because they “require[d] a physical act in the world — delivery of some form of notification to a user," *id.*, and "require[d] particular input from a user relating to the format of further communications, followed by the availability of that format." *Id.* at *16.

Regardless of whether *Alice* would require a different conclusion on the facts in *Rockstar*, it plainly requires a finding of patent-ineligibility here. The patent claims that the Supreme Court rejected in *Alice* required more in the way of "particular input" and "physical act[s]" than the claims in *Rockstar* — and much more than the patent claims here. The patent claims in *Alice* required, *inter alia*:

> (a) creating a shadow credit record and a shadow debit record for each stakeholder party to be held independently by a supervisory institution from the exchange institutions;
>
> (b) obtaining from each exchange institution a start-of-day balance for each shadow credit record and shadow debit record;
>
> (c) ... adjusting each respective party's shadow credit record or shadow debit record, allowing only these transactions that do not result in the value of the shadow debit record being less than the value of the shadow credit record at any time, each said adjustment taking place in chronological order, and
>
> (d) ... instructing on[e] of the exchange institutions to exchange credits or debits to the credit record and debit record of the respective parties in accordance with the adjustments of the said permitted transactions, the credits and debits being irrevocable, time invariant obligations placed on the exchange institutions."

Alice, 134 S. Ct. at 2352 n.2 (internal quotation marks omitted). Notwithstanding claim limitations requiring "particular input" by a user and "physical act[s]," *Rockstar*, 2014 U.S. Dist. LEXIS 67097, at *15, the Supreme Court held that these claims described "the abstract idea of intermediated settlement" and therefore were not eligible for patent protection under § 101. *Alice*, 134 S. Ct. at 2352.

Shortly after its decision in *Alice*, the Supreme Court granted certiorari in *Ultramercial*, upon which *Rockstar* relied, see 2014 U.S. Dist. LEXIS 67097, at *13-16, and vacated and remanded *Ultramercial* "for further consideration in light of *Alice Corp. v. CLS Bank Intl,* 573 U.S.__ (2014)," *sub nom*. *WildTangent, Inc. v. Ultramercial, LLC,* 573 U.S. ___, 134 S.Ct. 2870 (2014). As a result, *Ultramercial* is no longer good law.

The claims here are far more abstract than the claims in *Alice* or *Rockstar*. They describe utterly generalized concepts for treating and monitoring a remote patient — *i.e.,* assessing the patient's condition, changing the patient's treatment plan if appropriate, providing the patient with the revised treatment plan and presenting data on compliance. These are routine aspects of medical care — things doctors do every day based on their training and experience. The claims broadly address these abstract ideas — not some novel or unique way of implementing them. Under *Alice* and other authority, the claims of the '985 patent are not entitled to patent protection under § 101.

CONCLUSION

For the reasons set forth above, this Court should dismiss the complaint.

Dated: August 12, 2016

Respectfully submitted,

/s/ Charles S. Baker
Charles S. Baker
State Bar No. 01566200
cbaker@lockelord.com
LOCKE LORD LLP
600 Travis, Suite 2800
Houston, Texas 77002
Telephone: (713) 226-1200
Facsimile: (713) 223-3717

Attorneys for Defendant
DEVILBISS HEALTHCARE, LLC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on August 12, 2016. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Charles S. Baker
Charles S. Baker